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Nos. 04-1704, 04-1724

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioners. Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for respondents did not respond to requests for consent, thereby necessitating this motion.

WLF is a nonprofit, nonpartisan public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF engages in litigation and participates in administrative proceedings to defend free enterprise, individual rights, and a balanced civil justice system. To that end, WLF has frequently appeared as *amicus* in this Court

and lower courts to address issues of importance to free enterprise.

WLF is concerned that the decision of the Sixth Circuit, if not reversed, would undermine long-established and non-discriminatory methods employed by the States to create a favorable climate for business and thereby to promote business investment.

WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, nonpartisan public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] The interests of *amicus* are set out in the motion for leave to file this brief.

SUMMARY OF ARGUMENT

The States have long granted incentives through prospective tax credits to attract new investment in order to foster and promote economic growth in the state. The tax credit involved herein, one of many such State programs, should be upheld as constitutional. The scope of the dormant Commerce Clause should not be expanded so far as to prohibit a state's legitimate interests in stimulating economic growth in its state. The tax credit offered by Ohio neither involved the type of protectionist tax regime which has frequently been the object of dormant Commerce Clause invalidation nor did it in any way penalize a taxpayer for initiating, conducting or expanding activities outside Ohio. Finally, the decision should be reversed and the case should be dismissed on the basis that the plaintiffs in this case lack proper standing to challenge the tax policies adopted by Ohio.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

ARGUMENT

I. The Scope of the Dormant Commerce Clause Should Not be Expanded to Invalidate Ohio's Investment Credit Because It is Not Protectionist and Does Not Penalize Out-of-State Activities.

This Court has not used the Commerce Clause to invalidate tax programs involving mere economic competition for new investment on a level playing field. Most of the cases where this Court and others have invalidated state tax regimes under the dormant Commerce Clause have either (i) involved significant elements of protectionism, whereby a state sought to tax out of state products more heavily (*see, e.g., Bacchus Imports v. Dias*, 429 U.S. 318 (1977)) or (ii) sought to exploit some unique geographic location (*see, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981)) or other inherent advantage (*see, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977)) to coerce taxpayers to direct more of their business to that state. The programs in the first type of case easily fit into a "protectionist" category and the programs in the latter type of cases were in effect tying the unique advantage enjoyed by that state (whether it was location adjacent to offshore gas wells or location of most of the stock transfer agents in the country) to additional business activity.

There is another type of tax regime that this Court has struck down under the dormant Commerce Clause. That type of tax regime had the effect of increasing in-state taxation if the taxpayer increased its investment out of state. That type of tax regime was found invalid in *Westinghouse Electric v. Tully*, 466 U.S. 388 (1984). That type of tax regime is not involved in this case. Were DaimlerChrysler to locate additional facilities in Michigan or to run extra shifts at some or all of its Michigan factories to increase its output from

Michigan plants, such increased activity would in no way reduce the tax credit granted by Ohio.

Until the decision by the Sixth Circuit below, all of the cases where the dormant Commerce Clause invalidated a state tax provision involved a regime that in some fashion penalized activities in another state. That element is simply missing in this case. This Court has often stated the principle that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry" and that it does not prevent a state from competing with other States for a share of interstate commerce so long as it does not discriminatorily tax the products manufactured or the business operations performed in other states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-7 (1977). The investment credit offered by Ohio completely satisfies these criteria.

II. Judicial Restraint is Particularly Appropriate Where, As Here, The Type of Program Involved is Ubiquitous and Businesses and States Have Invested Heavily In Reliance on Existing Law.

Judicial restraint is particularly appropriate in this area where (i) so many states have built their economic development programs around incentives designed to comply with well-established understanding of the scope of the dormant Commerce Clause and (ii) so many businesses have invested so much capital and created so many jobs also in reliance on the long-established boundaries of the dormant Commerce Clause. Billions of dollars have been invested on the premise of validity of state tax incentives that are not protectionist and do not penalize out of state activities. Virtually every state that imposes an income tax currently offers tax incentives for new investment, creation of new jobs, and/or conduct of qualifying research and development

activity in that state. *See* Appendix A hereto for a partial representative listing of state statutes offering incentives of this kind.

The ubiquity of state tax credits similar to the credit offered by Ohio provides sound reasons for judicial restraint in this area. Untold business decisions have been made on the basis of the legitimacy of this type of incentive for economic development; financial statements of countless companies will have to be restated if these credits are retroactively invalidated; indeed in some cases these credits should enjoy contractual protection and consequently should be immune from retroactive invalidation.

Furthermore, the type of investment incentive involved herein is so widespread that the programs must necessarily come to the notice of Congress if objectionable. If these types of credits are to be invalidated, the decision should be made by Congress which, after investigating and holding hearings to understand the advantages and disadvantages of allowing such credits, can finely craft an appropriate rule. Should it decide which credits to allow and which credits to restrict or prohibit, Congress can also adopt carefully crafted transition rules, deciding in which cases, if any, the economic premises underlying the business decisions already made should be disturbed. The legislative process is well-equipped to craft that type of prospective rule with transition relief.

The Sixth Circuit mischaracterized the Ohio credit in one important fashion. It described the credit as available to offset DaimlerChrysler's existing tax liabilities. Pet. App. 6a. The credit is not retroactive and cannot be carried back (Ohio Rev. Code 5733.33(D)); hence it cannot offset existing tax liabilities. It is true that the credit could offset tax on income from DaimlerChrysler's existing facilities in Ohio, provided DaimlerChrysler is profitable in the three years following the grant of the credit and provided that the new

facilities of DaimlerChrysler do not cause sufficient additional income to be apportioned to Ohio fully to utilize the credit. Neither of these propositions can be known with certainty at the time that DaimlerChrysler makes the decision to build its new facility, and hence to describe the grant of the credit as "coercing" taxpayers to invest in Ohio is seriously to overstate the effect of the credit. It more fairly could be characterized as one incentive offered by Ohio in its effort to compete for its fair share of interstate business.

In a different tax area, this Court wisely deferred to Congress largely to resolve the competing interests of states' legitimate interest in collecting their sales/use taxes with the established expectations of merchants located out of state. In *Quill v. North Dakota*, 504 U.S. 298, 312 (1992), the Court built upon precedent but also drew an important distinction between Commerce Clause and Due Process jurisdiction. The Court clarified that even when jurisdiction to tax was present under the Due Process Clause, the Commerce Clause imposed an additional and distinct set of criteria, a set that could be legislatively regulated by Congress. Based on established expectations from earlier cases, the Court ruled that an out-of-state vendor had to have a physical presence in the state before the state could require it to collect sales/use tax from in state customers. The Court wisely minimized its involvement in ruling on state tax nexus issues, while disposing of the case in a manner that satisfied historic expectations and at the same time making it clear that Congress could change the rules if and when it wished. It is respectfully submitted that the Supreme Court should adopt a similar approach here. It should not, under the rubric of the *dormant* Commerce Clause, embroil itself in adjudicating a whole new class of state tax incentives, which for decades have been viewed as constitutionally permissible.

III. The Plaintiffs Lack Standing to Challenge State Tax Policies Not Affecting Them in Some Particularized and Specific Way.

Citizens unhappy with the tax policies of their jurisdiction have recourse at the ballot box, and when their objection to a state tax program is purely on policy, political or philosophical grounds, the doors to the courthouse should generally be closed to them. Persons whose only complaint is that their own taxes might increase as members of the public because a state has chosen to tax some other business or activity more lightly should not be allowed to burden the courts with their disagreements over state government policies. To bring an action to challenge a tax policy, plaintiffs should be required to have some more particularized injury, to show that their own taxes went up more so than just those of the public in general, to show that they are being discriminated against, or to show that the tax policy being challenged otherwise disadvantages them in a particular way.

Many cases have acknowledged that collection of tax revenues is vital to a sovereign, and two acts — the Anti Injunction Act (*see* 26 U.S.C. § 7421) and the Tax Injunction Act (*see* 28 U.S.C. § 1341) — codify this principle for both federal and state taxes. Neither of those acts is involved in this case as the collection of a tax is not involved. A sovereign, however, should collect that revenue pursuant to democratically-approved policies without having to defend its policies and methods from any and all citizens unhappy with the policies it is following. Hence suits by members of the public in general who have no particularized or specific injury should be disfavored. State tax officials should not be diverted from collecting revenues by having to defend their policies in court against challenges by anyone who is not aggrieved in some particularized manner and does not

complain that he overpaid his own taxes, but rather just disagrees with the wisdom of the state's policies.

The Court has long followed the doctrine that a plaintiff must have some particularized injury and not just "generalized grievances more appropriately addressed in the representative branches . . ." *Allen v. Wright*, 468 U.S. 737, 751 (1984), *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 474-5 (1982). "The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. [*Valley Forge*, *supra* at 472]." *Allen v. Wright* at 751. Here respondents have not and cannot allege personal injury, and for that reason their complaint should be dismissed. Particularly where the complaint is not from a taxpayer alleging that it was harmed by economic protectionism or discriminated against because it was an out of state company, the necessity of adequate standing provides the appropriate way to dispose of what essentially are philosophical or political issues not involving discrimination and consequently not properly implicating the dormant Commerce Clause.

This standing rule is particularly appropriate in cases such as this involving the dormant Commerce Clause, where the outlines are inherently somewhat amorphous. Unlike positive Constitutional provisions such as the Establishment Clause where the Constitution clearly prohibits a range of specific activities, the dormant Commerce Clause is considerably more susceptible to members of the public seeking to invoke it simply because they disagree with the policies being followed by a particular state. For example, a different rate of income tax for banks, or a different rate of tax on food from other tangible personal property, or a different rate of property tax for farms might arguably be a

basis for a challenge of a state's policies on dormant Commerce Clause grounds. Matters such as these should be left to the legislature, and if sufficient members of the public are unhappy with the policies, the appropriate recourse is to be found at the ballot box, not at the courthouse. Hence, particularly for challenges to tax policies on dormant Commerce Clause grounds, the plaintiff should be required to allege some particularized and specific basis of injury.

CONCLUSION

For the foregoing reasons, the Washington Legal Foundation respectfully urges this Court to decide that (1) the economic incentives granted by Ohio in the form of investment tax credits that can be used prospectively do not violate the dormant Commerce Clause and (2) the Plaintiffs herein lacked proper standing to bring an action challenging Ohio's tax policies on grounds that it was inconsistent with the dormant Commerce Clause.

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APPENDIX A

State	Credit/Incentive Type	Reference
Alabama	"Alabama Enterprise Zone Act" Incentive Tax Credits	Ala. Code § 41-23-20 et. seq.; § 40-18-190 et seq.
Alaska	Mineral Mining Exploration Incentive Tax Credit	Alaska Stat. § 27.30.010 et seq.
	Oil and Gas Exploration Incentive Tax Credit	Alaska Stat. § 38.05.180; Alaska Stat. § 41.09.010 et seq.
Arizona	Enterprise Zone Employment Incentive Tax Credit	Ariz. Rev. Stat. Ann. § 41-1521 et seq.; Ariz. Rev. Stat. Ann. § 43-1161
	Arizona Research and Development Incentive Tax Credit	Ariz. Rev. Stat. Ann. § 43-1168
Arkansas	Biotechnology Development and Training Incentive Tax Credit	Ark. Code Ann. § 2-8-101 et seq.
	"Emerging Technology Development Act" Incentive Tax Credit	Ark. Code Ann. § 15-4-2103 et seq.

California	California Research and Development Incentive Tax Credit	Cal. Rev. & Tax. Code § 23609
	Enterprise Zone Hiring Incentive Tax Credit	Cal. Rev. & Tax. Code § 23622.7
Colorado	Enterprise Zone Investment Incentive Tax Credits	Colo. Rev. Stat. § 39-30-103 et seq.
Connecticut	Connecticut Research and Experimental Expenditures Incentive Tax Credit	Conn. Gen. Stat. § 12-217j
	Enterprise Zone Incentive Tax Credits	Conn. Gen. Stat. §§ 12-217e, 12-217v
Delaware	Delaware Research and Development Incentive Tax Credit	Del. Code Ann. tit. 30, § 2070 et seq.
District of Columbia	"Economic Development Zone Incentives Act" Tax Credits	D.C. Code §§ 6-1501, 6-1504, 47-1807.04, 47-1808.07
Florida	Enterprise Zone Incentive Tax Credits	Fla. Stat. § 290.007
Georgia	Georgia Research and Development Incentive Tax Credit	Ga. Code Ann. § 48-7-40.12
Hawaii	High Technology Business Investment Incentive Tax Credit	Haw. Rev. Stat. § 325-110.9
	Hawaii Research and Development Incentive Tax Credit	Haw. Rev. Stat. § 325-110.91

Idaho	Idaho Research and Development Incentive Tax Credit	Idaho Code Ann. § 63-3029G
	"The Idaho Corporate Headquarters Incentive Act of 2005" Tax Credits	Idaho Code Ann. § 63-2901 et seq.
Illinois	Illinois Research and Development Incentive Tax Credit	35 Ill. Comp. Stat. 5/201(k)
	Enterprise Zone Investment and Hiring Incentives Tax Credits	35 Ill. Comp. Stat. 5/201(f); 35 Ill. Comp. Stat. 5/201(g)
Indiana	Indiana Research and Development Incentive Tax Credit	Ind. Code § 6-3.1-4-1 et seq.
Iowa	Iowa Research and Development Incentive Tax Credit	Iowa Code § 422.33(5)
	Enterprise Zone Incentives Tax Credits	Iowa Code § 15A.9; Iowa Code § 5E.191 et seq.; Iowa Code § 15E.232
Kansas	Kansas Research and Development Incentive Tax Credit	Kan. Stat. Ann. § 79-32,182b
Kentucky	Kentucky Research Facilities Construction Incentive Tax Credit	Ky. Rev. Stat. Ann. § 141.395
Louisiana	Louisiana Research and Development Incentive Tax Credit	La. Rev. Stat. Ann. § 47:6015

Maine	Maine Research and Development Incentive Tax Credit	Me. Rev. Stat. Ann. tit. 36, § 5219-K
Maryland	Maryland Research and Development Incentive Tax Credit	Md. Code Ann. Tax-Gen. § 10-721
	Qualified Business Expansion and Hiring Incentive Tax Credit	Md. Code Ann. Tax-Gen. § 10-704.8; Md. Code Ann. Tax-Prop. § 9-230
Massachusetts	Massachusetts Research and Development Incentive Tax Credit	Mass. Gen. Laws ch. 63, § 38M
Michigan	Michigan Pharmaceutical Research Incentive Tax Credit	Mich. Comp. Laws § 208.39f
	Renaissance Zone Incentive Tax Credits	Mich. Comp. Laws §§ 125.2686, 208.39b
Minnesota	Minnesota Research and Development Incentive Tax Credit	Minn. Stat. § 290.068
Mississippi	Manufacturers', Distributors' and Merchants' Qualified Property Incentive Tax Credit	Miss. Code Ann. § 27-7-22.5
	"Mississippi Broadband Technology Development Act" Qualifying Equipment Investment Incentive Tax Credit	Miss. Code Ann. § 57-87-5

Missouri	Expanded Business Facilities Incentive Tax Credit	Mo. Rev. Stat. §§ 135.100, 135.150, 135.155
	Missouri Research and Development Incentive Tax Credit	Mo. Rev. Stat. § 620.1039
Montana	Montana Research and Development Incentive Tax Credit	Mont. Code Ann. § 15-31-150(1)
Nebraska	Enterprise Zone Incentive Tax Credits	Neb. Rev. Stat. § 77-2734.03
New Hampshire	Community Reinvestment and Opportunity Zone Incentive Tax Credits	N.H. Rev. Stat. Ann. § 162-N:1 et seq.; N.H. Rev. Stat. Ann. § 77-A:5, XII; N.H. Rev. Stat. Ann. § 77-E:3-a
New Jersey	New Jersey Research and Development Incentive Tax Credit	N.J. Stat. Ann. § 54:10A-5.24
New Mexico	Enterprise Zone Incentive Tax Credits	N.M. Stat. § 7-2A-15 (1978)
New York	Qualified Emerging Technology Company Employment Incentive Tax Credit	N.Y. Tax Law § 210(12-E)
North Carolina	"William S. Lee Quality Jobs and Business Expansion Act" Incentive Tax Credits	N.C. Gen. Stat. § 105-129.2 et seq.
North Dakota	North Dakota Research and Development Incentive Tax Credit	N.D. Cent. Code § 57-38-30.5

Oklahoma	Enterprise Zone Incentive Tax Credits	Okla. Stat. 62 § 690.4; Okla. Stat. 68 § 2357.81
Oregon	Oregon Research and Development Incentive Tax Credit	Or. Rev. Stat. § 317.152
	Enterprise Zone Incentive Tax Credits	Or. Rev. Stat. § 285C.406; Or. Rev. Stat. § 285C.400; Or. Rev. Stat. § 317.124; Or. Rev. Stat. § 315.507
Pennsylvania	Pennsylvania Research and Development Incentive Tax Credit	Pa. Stat. Ann. 72 § 8701-B et seq.
Rhode Island	Rhode Island Research and Development Incentive Tax Credit	R.I. Gen. Laws § 44-32-3
South Carolina	South Carolina Research and Development Incentive Tax Credit	S.C. Code Ann. § 12-6-3415
	Corporate Income Tax Moratorium For Job Creation	S.C. Code Ann. § 12-6-3365
Tennessee	Jobs Creation Incentive Tax Credit	Tenn. Code Ann. § 67-4-2109(c)(2)
Texas	Texas Research and Development Incentive Tax Credit	Tex. Tax Code Ann. § 171.722
	Jobs Creation Incentive Tax Credit	Tex. Tax Code Ann. § 171.751 et seq.

Utah	Utah Research and Development Incentive Tax Credit	Utah Code Ann. § 59-7-612
Vermont	Vermont Research and Development Incentive Tax Credit	Vt. Stat. Ann. tit. 32, § 5930w
Virginia	Virginia Research and Development Incentive Tax Credit	Va. Code Ann. § 58.1-439.14
	Major Business Facility Jobs Creation Incentive Tax Credit	Va. Code Ann. § 58.1-439
Washington	Job Training Incentive Tax Credit	Wash. Rev. Code § 82.04.4333
	Washington Research and Development Incentive Tax Credit	Wash. Rev. Code § 82.04.4452
West Virginia	West Virginia Research and Development Incentive Tax Credit	W. Va. Code § 11-13R-1 et seq.
Wisconsin	Wisconsin Research and Development Incentive Tax Credit	Wis. Stat. § 71.28
	Development Zone Incentive Tax Credits	Wis. Stat. § 71.28(1dx)